In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-6067

BILLY DUREN,
Petitioner,

VS.

STATE OF MISSOURI,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR RESPONDENT

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OPINION BELOW

The opinion of the Missouri Supreme Court is reported at 556 S.W.2d 11 (1977) (A. 48).*

JURISDICTION

The judgment of the Supreme Court of Missouri affirming the petitioner's conviction was filed on September 27, 1977. A timely motion for rehearing was denied October 11, 1977. The petition for a writ of certiorari was filed January 19, 1978, and certiorari was granted by this court on May 1, 1978. This court has jurisdiction pursuant to 28 U.S.C. §1257(3).

*Page references designated "A. ....." in parantheses refer to the petitioner's printed Appendix previously filed with the court. Page references designated "R. ....." refer to the transcript of the petitioner's trial.

QUESTION PRESENTED

Was the petitioner's sixth and fourteenth amendment rights to a fair trial denied because the Missouri Constitution gives women the right to avoid jury duty by requesting an exemption?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the sixth amendment and the fourteenth amendment to the United States Constitution, Article I, §22(b) of the Missouri Constitution, §§494.020, 494.031, RSMo Supp. 1975, and Chapter 497, RSMo 1969 as supplemented. These constitutional provisions and statutes are set out in full in the respondent's Appendix A.

STATEMENT

The petitioner, Billy Duren, was convicted of murder in the first degree and assault with intent to kill in connection with a robbery attempt at a United States Post Office in Kansas City, Missouri (R. 407-408). At his trial, the petitioner claimed that his sixth and fourteenth amendment rights had been violated because his jury had not been drawn from a representative cross-section of the community because of the operation of Article I (A. 4), §22(b) of the Missouri Constitution. Article I, §22(b) provides that:

> "No citizen shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror."

The petitioner argued that because so many women in Jackson County exercise their right to avoid jury duty, the panel from which his petit jury was chosen did not represent a fair cross-section of the community (A. 4).

In support of his allegation, the petitioner entered into evidence the 1970 United States Census which indicated that 54 percent of the population of Jackson County over 21 years of age were women (A. 39). He also showed that for the periods June through October 1975 and January through March 1976, approximately 11,197 persons were summoned for jury duty and of that number, 2,992 or 26.7% were women. Of those summoned, 5,119 persons appeared and of that number 741 or 14.5% were women. During March, 1976, the month of petitioner's trial, 1,537 persons were summoned for jury duty, and of that number, 453 or 29.5% were women, and of the 707 appearing, 110 or 15.5% were women (A. 45). The petitioner also introduced into evidence the master printout of the 1976 Jackson County Jury Wheel which contained an unverified pencil note showing 29.1 percent women.

Finally, the petitioner submitted the testimony of John Fitzgerald, the Jackson County Jury Commissioner, who described the process by which jurors are selected in Jackson County (A. 11-21, 29-36).[1] That jury selection system begins with the voter registration list for Jackson County. From that list, the Data Processing Department selects approximately 70,000 names. A questionnaire is then sent to each individual selected (A. 11). A copy of that questionnaire (A. 43) appears in §497.130, RSMo Supp. 1975. Among other things, that questionnaire notifies women

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1. The jury selection system in Jackson County, Missouri is mandated by Chapters 494 and 497 of the Revised Statutes of Missouri, 1969 (as supplemented), and Article I, §22(b) of the Missouri Constitution.

of their right to be excused from jury duty. When these questionnaires are returned, the jury commissioner lists all individuals whose questionnaire indicates that they have exercised their right to be excused or that they are unqualified to serve as jurors.[2] The remaining pool of names is then entered into a computer and 25,000 names are randomly selected for the master jury wheel. If an individual fails to return the questionnaire, then the individual's name is automatically included in the pool from which the master jury wheel is selected (A. 17). In Jackson County, a new jury wheel is prepared each year. A woman who has exercised her option one year to avoid jury duty is not eliminated from the jury selection process in subsequent years. Each year she must take affirmative steps to avoid jury duty (A. 19).

Individuals are periodically selected from the master jury wheel by computer to make up the general jury panel for all civil and criminal divisions of the Jackson County Circuit Court (A. 12). Jury summons are sent out to each one of those individuals randomly selected from the jury wheel. These summons notify women that they have a right to be excused from jury duty. After receiving the summons, the individual is given an opportunity to present to the Circuit Court reasons why he or she would be unable to serve as a juror. All jurors who are not excused should appear in the circuit court

2. In order to promote an orderly and efficient judicial system, certain individuals are excluded from jury service by §494.020, RSMo Supp. 1975. For example, licensed attorneys and those unable to understand the English language may not serve on juries in Missouri. Section 494.031, RSMo Supp. 1975, on the other hand, allows certain individuals to be excused from jury duty if they make a timely application to the court; for example, persons over 65, doctors of medicine, school teachers, government workers, or clergy. Also, Article I, §22(b) mandates that a court shall excuse any woman who requests exemption before she is sworn.

for jury duty. If a woman does not appear, it is assumed that she has exercised her right not to serve (A. 17). Venire panels are then randomly selected from the individuals who have appeared for jury duty and the petit jury is selected from the venire panel. In the petitioner's case the record would indicate that his jury venire of 53 had 5 women (9.4%) and his petit jury of 12 was totally male.

The petitioner's conviction was appealed to the Missouri Supreme Court on the grounds that Article I, §22(b) had deprived him of a jury drawn from a representative cross-section of the community. On September 27, 1977, that court affirmed the petitioner's conviction, holding that Article I, §22(b) of the Missouri Constitution does not exclude women from jury duty and that the jury panel from which petitioner's jury was chosen did represent a fair cross-section of the community (A. 48-64).

SUMMARY OF ARGUMENT

In *Taylor* v. *Louisiana*, 419 U.S. 522 (1975) this court condemned state practices which excluded an identifiable group from the jury selection process. The State of Missouri's decision to allow women to avoid jury duty does not operate to exclude women and therefore violates neither *Taylor* v. *Louisiana* nor those cases which preceded *Taylor*.

Moreover, although women are entitled to a jury exemption in Missouri, nearly 30% of the persons on the 1976 Master Jury Wheel in Jackson County were women and more than 15% of the persons who appeared for jury duty in the months preceding the petitioner's trial were women. The pool from which the petitioner's jury was

chosen, therefore, did represent a fair cross-section of the community.

Finally, the petitioner has failed to show how he was injured by the Missouri jury selection process. Missouri does not exclude women from the jury selection process so the integrity of the jury selection system is not undermined. Furthermore, regardless of the composition of the jury or the jury pool in this case, a guilty verdict would have been returned because of the overwhelming nature of the evidence submitted by the state.

ARGUMENT

In 1945 the State of Missouri adopted a new Constitution which provided that:

> "No citizen shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror." Missouri Constitution, Art. I, §22(b)

The wisdom of this constitutional provision is not in issue before this court. The sole issue which must be resolved in this case is whether Billy Duren, a male, convicted of murder in the first degree by overwhelming evidence, was deprived of an "impartial" jury trial solely because women in Missouri are given the opportunity to avoid jury duty. It is respondent's position that the Missouri jury selection system is constitutional on its face and moreover that there is no evidence to show that the pool from which the petitioner's jury was chosen was not representative of a fair cross-section of the community. Furthermore, even if the Missouri jury selection system does violate the sixth amendment cross-sectional standard, the petitioner has not been thereby prejudiced and he is therefore not entitled to a new trial.

I. The Missouri Jury Selection System Does Not Exclude Women and Is Therefore Distinguishable From the Louisiana System Held Unconstitutional in *Taylor* v. *Louisiana*.

It is Mr. Duren's position that the female self-exemption provision in the Missouri Constitution deprived him of his sixth amendment and fourteenth amendment rights because so few women were available for jury duty in Jackson County that his jury was not drawn from a representative cross-section of the community. To support his position he relies primarily on *Taylor* v. *Louisiana*, 419 U.S. 522 (1975). In *Taylor* this court held that the jury selection system employed by the State of Louisiana deprived criminal defendants of their right to an impartial jury trial. La. Const., Art. VII, §41 (since repealed), sets out the constitutionally offensive procedure:

> "The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no women shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service. . . ."

The court pointed out that this provision operated to systematically exclude women from jury service, and therefore, deprived criminal defendants of a jury composed of a representative cross-section of the community. It further held that a jury drawn from a representative cross-section of the community was essential to the fulfillment of the sixth amendment's guarantee of an impartial jury trial in criminal prosecutions, and that this guarantee was imposed on the states by virtue of the fourteenth amendment.

The Louisiana constitutional provision cited and Art. I, §22(b) of the Missouri Constitution, however, are readily distinguishable. In Louisiana a woman was not eligible for jury service unless she took affirmative steps to inform the court of her desire to serve as a juror. In Missouri, on the other hand, women are automatically included in the jury list. They are excused from jury service only when they take affirmative steps to notify the court that they do not wish to serve. The Missouri system of jury selection, therefore, does not exclude women. It merely allows an exemption for those who wish to exercise it.

The petitioner and the Solicitor General of the United States, however, claim that the *Taylor* decision is not limited to those cases where an identifiable group is excluded or deterred from serving on juries.[3]

The cross-sectional standard, however, has meaning only within the context in which it evolved. In *every* case cited by this court in support of its decision in *Taylor* v. *Louisiana*, an identifiable group was denied the *right* to serve on juries. In none of those cases did the court give any indication that the cross-sectional standard could be violated merely because an identifiable group was given an exemption by the state. For example, in *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946) this court defined the cross-sectional standard as follows:

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from

3. In *Taylor* v. *Louisiana*, this court repeatedly used the term "exclude" or one of its derivatives to describe the practice it was forbidding the state to engage in. "Exclude" has been defined as: To bar or keep out . . . to leave out, or to omit purposely. *Oxford English Dictionary* 1961.

> a cross-section of the community. [citations omitted] This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. *But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups.*" (*Id.* at 220) [emphasis added]

Moreover, the analytical foundation of those cases cited in *Taylor* v. *Louisiana* does not permit an extension of the cross-sectional standard to include the situation where an identifiable group is granted the privilege of self-exemption from jury duty. In *Peters* v. *Kiff*, 407 U.S. 493 (1972) this court noted that illegal and unconstitutional jury selection proceedings cast doubt on the integrity of the whole judicial process. Since the harm to the system affected both white and black defendants equally, the court held that a white person had standing to contest the validity of his conviction on the basis that black people had been excluded from the jury. Likewise in *Ballard* v. *United States*, 329 U.S. 187 (1946) this court emphasized that the defendant did not need to show that she was individually prejudiced by the exclusion of women from her jury because:

> "[t]he evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. . . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Id.* at 195.

The rationale for the court's decision in each of these cases relies heavily on the results which occur when an identifiable group is excluded from the jury selection process. Where there has been no exclusion from the jury selection process then the analysis in those cases is inapplicable.

In *Taylor* v. *Louisiana* this court recognized the importance of these cases by repeatedly condemning a jury selection system that excluded an identifiable segment of society. It recognized that the Louisiana system which required a woman to take affirmative steps to participate in the jury selection system while not requiring men to take similar steps amounted to a tacit exclusion of women and was therefore unconstitutional. Article I, §22(b) however specifically protects the right of women in Missouri to participate unfettered in the jury selection process.

Finally, when defining the parameters of the cross-sectional standard, it should be remembered that the cross-sectional standard has been made applicable to the states by way of the fourteenth amendment due process clause. It is the respondent's position that due process principles would be severely distorted if *Taylor* v. *Louisiana* is extended to include those situations where a state has neither inhibited nor excluded an identifiable group from the jury selection process.

In *Duncan* v. *Louisiana*, 391 U.S. 145, 148-149 (1968), this court listed some of the tests which have been used to determine whether a right extended by the sixth amendment is also protected against state action by the fourteenth amendment. After reviewing those tests the court concluded that:

> "The question, thus, is whether given this kind of system a particular procedure is fundamental—

> whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty." *Id.* at 149-150, n.15.

When a state either excludes or inhibits an individual from serving on a jury it is reasonable to say that a criminal defendant has been denied a "fundamental right, essential to a fair trial". This is because there is at least the appearance that the state is trying to change the outcome of the trial by limiting the kind of juror who is likely to hear the case. Since the state is obligated by our "Anglo-American regime of ordered liberty" to provide a criminal defendant with an impartial jury, an action by the state which even gives the appearance of partiality would violate the sixth and fourteenth amendments. However, when the state chooses to extend a privilege to a group by not forcing them to serve on juries, there is not even the appearance of partiality. How then have due process principles been offended? Even assuming that women have a different perspective than do men,[4] is the absence of that perspective so critical that it can be said that the "Anglo-American regime of ordered liberty" has been undermined? In prior cases this court has recognized that due process principles protect the criminal defendant's right to be tried by a jury, *Duncan* v. *Louisiana*, *supra*, his right to be represented by an attorney, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), his right to have unreliable identification testimony excluded, *Neil* v. *Biggers*, 409 U.S. 188 (1972) and his right to have evidence excluded

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4. This appears to be the assumption made by this court in *Ballard* v. *United States*, 329 U.S. 187, 193-194 (1946) when it stated: "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded."

that has been unconstitutionally seized by the police. See *Mapp* v. *Ohio*, 367 U.S. 643 (1961). In comparison with these rights a criminal defendant's right to have an arbitrary number of women available to serve on his jury is dwarfed. The petitioner has intimated that the Missouri Supreme Court's decision trivializes this court's opinion in *Taylor* v. *Louisiana*. It is respondent's position that if the petitioner's analysis is adopted by this court, it is the fourteenth amendment due process clause which would be trivialized.

II. The Petitioner Has Failed to Show That the Pool From Which His Jury Was Drawn Did Not Represent a Fair Cross-Section of the Community.

Even if the petitioner is able to convince the court that there is not a compelling distinction between the jury selection practices in Louisiana and Missouri, he is not entitled to a reversal unless he can also show that his jury was not drawn from a pool fairly representative of a cross-section of the community.[5] In *Taylor* v.

5. Clearly the Missouri jury selection system is not unconstitutional on its face. The tenth circuit in *U. S.* v. *Test*, 550 F.2d 577 (10th Cir. 1976) concluded that in order to make out a valid cross-sectional case, a defendant would need to show that: 1) an identifiable group, 2) has been systematically excluded by the jury selection process, and 3) that the result of the exclusion is that the jury pool is not representative of a fair cross-section of the community. A mere showing, therefore, that women are given an exemption from jury duty would be insufficient to support a cross-sectional challenge if the petitioner's jury panel had a sufficient number of women on it. For example, in *State of Missouri* v. *Andrew Lee Harris*, No. 39,102, Mo. Ct. of App., St.L., June 20, 1978, the defendant claimed that his sixth amendment rights had been violated because women could exempt themselves from jury duty in Missouri. The defendant's claim was summarily dismissed when the Court of Appeals noted that on the defendant's first jury panel of eighteen, thirteen were women, and on the second panel of seventeen, twelve were women. As a result, from a total of thirty-five potential jurors, twenty-five were women. The jury finally sworn was com-

(*Continued on following page*)

Louisiana, supra, this court stated that:

> "Accepting as we do, however, the view that the sixth amendment affords the defendant in a criminal trial the opportunity to have the jury drawn from venires representative of the community, we find it is no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequence is that criminal jury venires are *almost totally male.*" (*Id.* at 528) [emphasis added]

What then does "almost totally male" mean? "Total" has been defined as "whole, not divided, lacking no part, entire, full, complete." *Oxford English Dictionary* 1961. "Almost" has been defined as "only a little less" than. *Oxford English Dictionary* 1961. "Almost totally male" then would seem to mean only a little less than all male. That was, of course, precisely the situation in *Taylor* v. *Louisiana*. The evidence in that case showed that no more than 10% of the persons on the master jury list were women, that only twelve women were among the 1,800 persons drawn to fill petit jury venires during the period when the defendant was tried; and that the 175 member venire from which the defendant's petit jury was in fact drawn had no women on it. In contrast, the petitioner's own evidence shows that almost 30 percent of the persons on the 1976 master jury wheel in Jackson County were women; more than 15 percent of the persons appearing for jury service

Footnote continued—

prised of eleven women and one man. It would be ludicrous indeed to assume that a defendant was denied an impartial trial merely because women are given the privilege of avoiding jury duty when women were proportionally over-represented on the jury which tried him and on the venire panel from which the jury was chosen. This case also belies the accuracy of the petitioner's and this court's statement that women will refuse to serve on juries unless they are required to. A copy of the *Harris* opinion is found in Respondent's Appendix B.

during the week of the petitioner's trial were women; and that of the 53-member venire from which the petitioner's jury was chosen five were women. This composition could hardly be characterized as "almost totally male." It seems clear that the situation in *Taylor* v. *Louisiana* was an extreme case which resulted from the state's requirement that women take affirmative steps to participate in the jury selection process, effectively excluding women from jury service. Such is not the case in Jackson County, Missouri.[6]

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6. Both the petitioner and the Solicitor General of the United States have concluded that the exemption for women in Missouri results in under-representation of women on juries by a little less than 75%. They do not, however, indicate the methodology used to arrive at that figure. As discussed in Kairys, Kadane, and Lehoczky, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 Cal.L.Rev. 776 (1977), the critical problem faced by courts and lawyers forced to deal with cross-sectional challenges is the fact that this court has never indicated how to measure representativeness or what a permissible deviation is. In Kairys, Kadane, and Lehoczky, *Jury Representativeness: A Mandate for Multiple Source Lists, supra,* five or six different standards for the evaluation of representativeness are described and the percent of under-representation varies radically depending upon what standard of evaluation is chosen. For example, if the absolute disparity standard were applied to the facts alleged by the petitioner, then the percent of under-representation would be just under 40% rather than just under 75%. The lack of uniformity and analysis in this case and in the other cases cited by the petitioner and the Solicitor General merely underscores the dangers inherent in basing constitutional principles on statistical analysis. It is hoped that if this court does extend the scope of *Taylor* v. *Louisiana,* to include those cases where the state has merely granted a group the right to exempt themselves from jury duty, that it will also provide the states with a framework in which to analyze their jury selection systems so that valid convictions will not be reversed merely because the state is unaware of which standard and deviation will be applicable.

III. The Petitioner Has Failed to Show That Article I, §22(b) Had Any Effect on the Number of Women Available for Jury Duty During the Week of the Petitioner's Trial.

Finally, a mere showing that a venire is not representative of a cross-section of the community is not sufficient. It must also be shown that the lack of representation of an identifiable group on the jury venire was the result of the systematic exclusion of that group by the jury selection process. The petitioner concludes that any disparity between the number of men and women on his venire was the result of the operation of Article I, §22 (b), Missouri Constitution. The petitioner, however, has failed to produce any evidence to show that the percentage of women who actually appeared in court for jury service was less than the percentage of women initially summoned for jury service because a substantial number of women exercised their right to drop out of the jury process solely because of their sex. Section 497.130, RSMo Supp. 1975 provides exemption for groups other than women. For example, clergymen, doctors, teachers, government workers, and any person over the age of 65 are entitled to automatic exemptions from jury service. It is possible that the disparity between the number of men and women on the petitioner's venire resulted from women exercising occupational, physical or mental exemptions.

Nor has the petitioner presented accurate statistics to show the number of women available for jury duty in Jackson County Missouri. It is true that he introduced at the hearing on his motion for a new trial the 1970 United States census which shows that Jackson County had approximately 467,000 inhabitants over 21 years of age and 54 percent of those inhabitants were women. The

annual Jackson County jury selection process, however, begins with the current registration list, not the 1970 Census. No proof was made that the sexes registered to vote in direct relation to their numbers. In fact, the petitioner in his own brief admits that a smaller percentage of women in Missouri register to vote than do men.[7] Moreover, in Missouri, as elsewhere, a person over 18 years old is eligible to vote. The percentage of women over 21 years of age, therefore, does not accurately reflect the pool of women who are available to serve on juries in Missouri.[8]

Finally, the petitioner and the Solicitor General of the United States place great emphasis on what they characterize as the two-stage process of elimination of women from the jury selection system. They point out that thirty percent of the persons on the jury wheel are women, but only about fifteen percent of the persons available for trial are women. They contend that the reduction from thirty to fifteen percent is the result of women receiving the jury summons which indicates that women are exempt from jury duty. If, however, a woman wanted an exemption merely because she was a woman, the exemption was readily available when she first received the

7. In *Jury Representativeness: A Mandate for Multiple Source Lists, supra* at n.6, the authors indicate that most underrepresentation in our jury selection system is directly attributable to the use of voter registration lists.

8. The petitioner argues that his population statistics were a valid indicator of the relevant population because similar statistical evidence was relied on by this court in *Alexander* v. *Louisiana*, 405 U.S. 625 (1972). In *Alexander* v. *Louisiana*, though, the jury selection process did not begin with a single list but with a series of lists arbitrarily chosen by the Jury Commissioner. There was no one source, therefore, built into the system which could be analyzed to determine the relevant population. It is also interesting to note that in *Alexander* v. *Louisiana* the defendant did introduce the relevant voter registration list. Moreover, in *Taylor* v. *Louisiana*, the demographics relied on by this court were stipulated to; no such stipulation has been made in this case.

questionnaire. There is at least an inference, therefore, from the evidence that those women who were excused after receiving the summons had reasons other than their sex-related exemption. In *Taylor* v. *Louisiana, supra* at 524, the parties stipulated that the "discrepancy between females eligible for jury service and those actually included in the venire was the result of the operation of the Louisiana Constitution." No similar stipulation has been made in this case.

IV. The Petitioner Has Failed to Show How He Was Harmed by the Operation of Article I, §22(b).

Finally, the petitioner has not proven nor even alleged that he was harmed in any way by the jury selection process which resulted in his petit jury. It is true that in cases prior to *Taylor* v. *Louisiana*, this court held that a defendant need not show that he was individually harmed by a violation of the cross-sectional standard. The court reasoned that a procedure which excludes an unidentifiable group from the jury selection process undermines the integrity of the jury selection system. As has been previously pointed out, however, women in Missouri are not excluded from jury duty. They can and do serve in significant numbers. Neither actual bias nor the appearance of bias could possibly result because women in Missouri are not forced to serve on juries.

What harm then has the petitioner suffered? In *Peters* v. *Kiff, supra*, and in *Ballard* v. *United States, supra*, this court placed great emphasis on the special "flavor" that women brought to a jury and referred to studies made several years ago showing that women *may* be more sympathetic to the criminal defendant. In *Peters* v. *Kiff*, the court stated that it was impossible to determine what a jury selected by a constitutional procedure would have

decided and that the state must suffer the consequences of this "unavoidable uncertainty". Respondent submits, however, that the evidence of guilt in this case is so overwhelming that no matter who had served on the petitioner's jury, a guilty verdict would have been returned. The evidence shows that on Friday, September 26, 1975, around noon, two black men attempted to rob the Post Office at 2618 Guinotte, Kansas City, Missouri. During the attempt, an electrician, Carrol Riley, was shot in the head and killed (R. 173-174, 253). Paul Davis, a customer, positively identified the petitioner as the robber who held the gun during the robbery (R. 224-226). Lee Kennison, the manager of the Post Office, testified that he saw the petitioner shoot Carrol Riley in the head (R. 255); and Floyd Sherwood, a clerk, stated that the petitioner looked similar to the robber who shot Carrol Riley in the head (R. 181). There was also testimony that after shooting Carrol Riley, the petitioner turned, paused and shot Lee Kennison in the side (R. 174, 254).

Arthur Mitchell testified that he and the petitioner were the two black men who attempted to rob the Guinotte Street Post Office (R. 327) and that Billy Duren was the one who shot Carrol Riley (R. 32). On the morning of the robbery, Mitchell and Duren went to the home of Renita Adkins, Mitchell's girl friend (R. 319). Renita Adkins overheard Duren tell Mitchell that he had some place to "rip off" (R. 212). John Starr also testified that on the morning of the robbery while he was at Renita Adkins' apartment, Mitchell and Duren asked him if he wanted to go with them to rob the post office (R. 293-294). He declined to join them and later after the robbery he called the police and told them about his conversation with Mitchell and Duren (R. 296).

The defense called Lottie Smith, Billy Duren's girl friend, and Duren's sister Mary. Lottie stated that she was with Duren at all times between Thursday night and Sunday morning when Duren was arrested (R. 359). She also indicated that she had not told anyone this until Duren had spent more than five months in jail (R. 369-370). Mary testified that around noon on the day of the robbery she saw Billy Duren and Lottie Smith in a house at 31st and Tracy (R. 376-377). Likewise, Mary testified that she had not told anyone this story until several weeks after the robbery (R. 304). Billy Duren took the stand in his own behalf and denied any complicity in the robbery, denied ever being at Renita Adkins's apartment, and denied ever having talked to Mitchell or Starr about a robbery (R. 385-390).

It has long been recognized that not every constitutional error will result in a reversal. A reversal is warranted unless a court can "declare a belief that . . . [the error] was harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 24 (1967). The *Chapman* standard was interpreted in *Harrington* v. *California*, 395 U.S. 250 (1969) and *Schneble* v. *Florida*, 405 U.S. 427 (1972), to mean that a reversal is not required unless there is a reasonable possibility that the error materially affected the verdict. *U.S.* v. *Valle-Valdez*, 554 F.2d 911 (1977). In this case there is no possibility that a jury selected from a pool with "X" percent women rather than 15 percent women would have reached a different verdict. Regardless of the composition of the jury, a guilty verdict would have been returned.

CONCLUSION

For the foregoing reasons, the petitioner's conviction should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES CONSTITUTION, AMENDMENT VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION, AMENDMENT XIV:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at

any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

MISSOURI CONSTITUTION, ARTICLE I, SECTION 22(b):

No citizen shall be disqualified from jury service because of sex, but the court shall excuse any women who requests exemption therefrom before being sworn as a juror.

REVISED STATUTES OF MISSOURI, 1975 SUPPLEMENT:

497.130. List of jurors, selection, data processing equipment authorized—questionnaire—refusal to answer, contempt—false answer, misdemeanor.—1. The board of jury supervisors shall at least biennially compile a list of as many names as the board of jury supervisors designates in a written order made for that purpose by consulting any public records. Automation data processing equipment and procedures may be utilized in the selection of the names for the list and in the actual compilation of the list. The list in no case shall contain less than twenty-five thousand names to be selected as nearly as

may be equally from the several voting precincts in the county. The compiled list shall constitute the jury list. A key number shall be designated by the board of jury supervisors, in a written order made for that purpose, which shall not be the same for any two consecutive periods. The jury commissioner shall select from the list of qualified voters the names which appear on the list in positions corresponding to the key number or multiples thereof until a sufficient number of names, which in no case shall be less than twenty-five thousand, are selected to make up the required number of prospective jurors. In the selection of names of prospective jurors from the list of voters, no examination shall be made into the qualifications of persons selected, except that a suitable questionnaire and return shall be sent to the persons selected according to the key number or multiples thereof. The questionnaire shall be in the following form and none other, without additions or subtractions, to wit:

OFFICIAL NOTICE AND QUESTIONNAIRE

(Not a Summons)

No. .....

Name .....

Address .....

City .....

Enter change of address here .....

You have been selected under the provisions of the Missouri statutes for jury service.

This questionnaire should be returned immediately.

The laws of the State of Missouri provide that if you do not answer and return this questionnaire, you are subject to citation for contempt.

The law further provides that if you knowingly and falsely answer any of the questions herein contained, you may be guilty of a misdemeanor.

The law requires your name to be placed in the jury wheel if answer is not received promptly.

BY ORDER OF THE BOARD OF JURY SUPERVISORS,
UNDER AND BY AUTHORITY OF LAW.

.....

Jury Commissioner

(1) Please state your sex. Male ( ) Female ( ) (If you are a female and do not wish to serve, see back of questionnaire.)

(2) Name of husband or wife .....

(3) Are you over sixty-five years of age? Yes ( ) No ( ). Date of birth. Month ..... Day ..... Year .....

(4) Are you a member of the fire company or police department? Yes ( ) No ( ). (If your answer is "yes", state which.) .....

(5) Are you actually exercising the functions of clergyman or any professor or other teacher of any school of learning? Yes ( ) No ( ). (If your answer is "yes", state where you are so engaged.) .....

(6) Are you a registered and licensed osteopathic physician, veterinarian or chiropractor? Yes ( ) No ( ). (If your answer is "yes", state which.) .....

(7) If you are a female, or if your answer to any of the above questions 3, 4, 5 and 6 is "yes", then under the law of Missouri, you cannot be compelled to serve as a juror, so state if you will serve. Yes ( ) No ( ).

(8) Are you actually engaged in the practice of law, medicine or dentistry? Yes ( ) No ( ). (If so, please state which profession.) .....

(9) Are you a member on active duty with any branch of the armed forces of the United States? Yes ( ) No ( ).

(10) Is the address shown on the questionnaire correct? Yes ( ) No ( ). (If your answer is "no", state present address.) .....

(11) Are you physically able to serve? Yes ( ) No ( ). (If not, attach physician's or authorized Christian Science practitioner's statement or you will be called.)

(12) Have you served within the last year? Yes ( ) No ( ). (This will be checked if your answer is "yes".) (As a part of said questionnaire, the following information and none other may be elicited without addition or subtraction.)

TO MEN OVER 65 YEARS OF AGE:

If you are over sixty-five and elect not to serve, fill out this paragraph and mail questionnaire at once to jury commissioner. It will not be necessary to answer the other questions.

Give date of birth .....
Day Month Year

I elect not to do jury service.

.....

Signature

TO WOMEN:

The constitution permits women to elect to serve or not to serve as jurywomen. Any woman who elects not to serve will fill out this paragraph and mail this questionnaire to the jury commissioner at once. It will not be necessary to answer the other questions.

I elect not to perform jury service.

.....

Signature

2. When the return questionnaire is received by the jury commissioner, the name of the person returning the questionnaire shall immediately be put on the list of prospective jurors unless the person returning the questionnaire is ineligible to serve as a juror under section 494.010 or 494.020, RSMo, or is entitled to be excused from jury service under section 494.031, RSMo, and by the return questionnaire requests exemption from jury service, none of whom shall be put on the list of prospective jurors.

3. If any person refuses or neglects to answer promptly all questions and to sign his name, and return the questionnaire to the board as herein provided, his name shall be placed on the list of prospective jurors and he may be cited and charged for contempt by the presiding judge of the circuit court and caused to appear before him. After reasonable notice and a hearing, if the judge is satisfied that the refusal or neglect is without a good and sufficient reason, he may adjudge the person to be guilty of contempt.

4. If any person knowingly answers any of the questions falsely, he is guilty of a misdemeanor.

REVISED STATUTES OF MISSOURI 1969:

497.010. Juries, petit and grand, in certain counties.—In every judicial circuit in this state comprised of a county which now has or may hereafter have not less than four hundred and fifty thousand nor more than seven hundred thousand inhabitants, according to the last preceding national census, all grand and petit jurors for the circuit courts shall be selected as provided in this chapter.

497.020. Board of jury supervisors—quorum.—There is hereby created a board of jury supervisors. The judges of the circuit court of said judicial circuit shall be and constitute said board. A majority shall constitute a quorum for the transaction of business and the acts of a majority of those present at any meeting at which a quorum is present shall be the duly considered acts of the board.

497.030. Duties of board of jury supervisors.—1. It shall be the duty of the board of jury supervisors, in addition to the duties herein enumerated, to exercise a general supervisory control over the jury commissioner and all deputies appointed as provided in this chapter by said board in any such judicial circuit; also, over the number of names on the annual jury list compiled as provided in section 497.130, which shall in no case be less than twenty-five thousand, and over the lists and records of jurors and the allowance of exemptions and excuses from jury service, and to see that all laws relative to juries and jury duty are faithfully complied with.

2. It shall also be the duty of said board to see that names of persons selected for service as grand jurors in any such judicial circuit are made into a separate list and stricken from the general list in the office of the

said board of jury supervisors, and that all such persons are excused from petit jury service, during the time their names are on such grand jury list.

497.040. Appointment of jury commissioner.—Within sixty days after the effective date of this chapter, the said board of jury supervisors, or a majority of them, shall appoint a jury commissioner who shall have been a resident of such judicial circuit for at least five years preceding his appointment.

497.050. Removal of jury commissioner—deputy to serve, when—board to fill vacancy.—1. The jury commissioner so appointed shall hold office at the pleasure of the board of jury supervisors. The said board of jury supervisors shall have power at any time to remove such jury commissioner for any cause by said board, or a majority of them, deemed sufficient, by an order entered on the records of said board declaring the fact of such removal.

2. In the event of the sickness, absence or disability of the jury commissioner, the board of jury supervisors shall designate a deputy to perform the duties of jury commissioner.

3. The appointment or removal of such jury commissioner shall be certified by the chairman of said board, to the county court of said judicial circuit. In case of any vacancy occurring in said office of jury commissioner, it shall be the duty of said board to fill such vacancy by appointment of some other person possessing the proper qualifications, in like manner as herein provided.

497.060. Jury commissioner to take oath of office.—Before entering upon the duties of his office the person so appointed jury commissioner shall take and subscribe before the presiding judge of circuit court of such judicial circuit, an oath or affirmation to support the Constitution of the United States and of this state, and to demean himself faithfully in office.

497.070. Salary of jury commissioner.—The jury commissioner shall receive a salary of six thousand six hundred dollars per annum, payable in equal monthly installments at the end of each month. The salary shall be paid by the county in which the judicial circuit is located.

497.080. Deputy jury commissioners, appointment, oath of office, duties.—1. The board of jury supervisors shall, from time to time whenever necessary for the proper discharge of their duties, appoint two or more deputy jury commissioners, one of which shall be designated as chief deputy. The appointments shall be entered in the record of the board, and a certified copy thereof shall be filed with and preserved by the registrar.

2. Each deputy before entering upon his duties as such, shall take and subscribe before the presiding judge of the circuit court an oath or affirmation to support the Constitution of the United States and of this state and to demean himself faithfully in office. Each deputy shall obey the lawful orders of the board and the jury commissioner pertaining to the proper execution of his duties.

497.090. Salary of deputies.—Each of the deputies who are regularly employed throughout the year shall receive for his services a salary not exceeding three hundred dollars per month except the chief deputy who shall receive a salary not exceeding three hundred fifty dollars per month; and each of the deputies who are employed for temporary purposes shall receive a salary not exceeding ten dollars per day for each and every day he is actually

employed in performing his duties as such. The amount of the salary shall be fixed by the board in each case and the salaries shall be provided for and paid monthly by the county in which the judicial circuit is located, in like manner as herein provided for the payment of the salary of the jury commissioner.

497.100. Meetings of board of jury supervisors.—The said board of jury supervisors shall hold meetings at least once every three months, and at any other time on call of the chairman of said board or on call of any two members of the said board whenever the business of the said board may require it.

497.110. Jury commissioner to be secretary of board of supervisors.—The jury commissioner shall be the secretary of the said board of jury supervisors, and shall perform such functions as such secretary, as may be required of him by the said board.

497.120. Reports of jury commissioner.—1. It shall be the duty of said jury commissioner at least once every three months, to make a report in writing, of his proceedings as such jury commissioner. Such report shall be presented to said board during the session thereof, and shall be by order of said board entered upon the records thereof. Said report shall show, among other things, the number of jurors called for service, the number who served, the number excused, the number of jurors furnished by said jury commissioner for service in the several courts.

2. Said jury commissioner shall, within a week after the first day of September, including the year in which he shall be appointed, make a report in writing, of his proceedings as such jury commissioner during the twelve months next preceding the thirty-first day of August in said year. Such report shall contain a statement of the

expense of his office, the number of deputies employed and the time during which each of them was employed, and the compensation received by them and a summary of the items of the quarterly report.

497.140. Lists of prospective jurors, how kept—data processing equipment authorized—court en banc to select data processing equipment—names selected in presence of board.—1. The jury commissioner shall have each name on the list of prospective jurors typed, imprinted or otherwise recorded upon a separate card of uniform size or upon data processing records and shall annually on or before October first of each year beginning on or before October 1, 1968, deposit all such cards in the jury wheel or in the automation data processing equipment provided for that purpose and shall thoroughly mix the same before drawing any of the prospective jurors' names from said wheel or automation data processing equipment. Said wheel, jury lists and records shall be securely locked and retained constantly under the control of the board.

2. It shall be the duty of the court en banc to select the automation data processing equipment authorized by this chapter.

3. No cards shall be placed in the jury wheel, nor jury records placed in the data processing equipment, unless done so in the presence of a majority of the members of the board of jury supervisors and no card or jury record shall be drawn therefrom unless done so in the presence of the members of said board.

497.160. General panel for all divisions of circuit court—excuses—judge may allow jurors to leave general jury quarters—jury wheel.—1. Where the circuit court is composed of more than one division except as herein provided, one general panel of jurors shall be drawn for

all civil or criminal divisions, the number of names to be drawn for such general panel to be determined by the judge designated by a majority of the judges of the court. The panel shall be drawn and summoned as provided in sections 497.170 and 497.230, and all jurors so summoned shall appear before such judge of said circuit court, who shall hear and determine whether jurors shall be excused from service or excused to a day certain which shall not be for more than ninety days. Whenever any person summoned as a juror under this chapter shall be excused by the court from service to a later time certain, the court shall designate the time when he shall so serve, and the jury commissioner shall be notified thereof by the judge of the division of said court. The jury commissioner shall thereafter cause said juror's name to be included on a separate list for service on such later date. All persons desiring to be excused from serving as jurors shall present their application to the judge having charge of such jurors.

2. Those not excused shall be retained as the general panel for all divisions of the court and shall be placed in charge of the sheriff, in quarters to be provided by him in the courthouse, there to remain except when actually engaged in the trial of a cause, or thereafter excused by a judge of the court. A judge of the court may allow jurors to remain away from the general jury quarters, provided such jurors shall be promptly available for service at the trial of a cause. Any juror who is so allowed to remain away from the general jury quarters for one or more full days shall not be entitled to any compensation for jury service during such day or days.

3. The name of each juror so enrolled upon such general panel, having been typed or imprinted on a card of uniform size and kind, shall by said jury commissioner

in the presence of a judge or sheriff of said court be placed in a small jury wheel which shall be in charge of said jury commissioner to await, under lock, assignment for jury service in the respective divisions.

497.170. Panel of petit jurors—selections—excuses.—1. Whenever any division of said circuit court shall require a panel of petit jurors for jury service, the judge of such division shall designate the number of jurors required and make a requisition therefor upon the jury commissioner in charge of the small jury wheel. Upon receipt of such requisition, the said jury commissioner, in the presence of a sheriff of said court, shall turn said wheel and thoroughly mix the cards therein and, being so situated as to be unable to see the names on said cards, shall publicly draw from said wheel a number of cards equal to the number of petit jurors so required.

2. Such jury commissioner shall then make a list of the names of said jurors so drawn and the sheriff of said court shall cause the jurors whose names are thereupon to appear before the judge of the division so requesting such panel of jurors so drawn to be placed in a sealed envelope and delivered by the sheriff to the judge of said division of said circuit court requesting such panel. The judge of the division of said circuit court so requesting such panel shall cause the list of jurors so furnished to be compared with the cards so received and he shall retain the cards bearing the names of such jurors as may be retained for jury service in said division of said court.

3. Whenever any juror upon such panel shall be excused from further service in said division, such juror shall be directed to return to the quarters provided for the panel of jurors and to report to the sheriff in charge thereof and the card bearing the name of such juror shall be returned to the jury commissioner in charge of said

small jury wheel and be promptly replaced in said wheel; provided, that the judge of any division thereof may cause to be drawn and summoned a general panel of jurors for service in such division of said court; the number of jurors so drawn and summoned to be determined by such judge.

4. The judge of the division of said court for which said general panel of jurors was so drawn and summoned shall determine all excuses and shall designate the clerk to be in charge of a small jury wheel. The cards bearing the names of all jurors remaining upon such general panel shall be placed in a small jury wheel and such panels of petit jurors as may be required for service in such service in such division shall be selected by means of said small jury wheel in the same manner, as near as possible, in all respects, as is herein provided for the selection of petit jurors from a full panel of jurors, drawn and summoned for service in all divisions of said circuit court.

497.180. Extra jurors for trial of particular cause.—When a jury for the trial of a cause cannot be made up from the regular panel, the judge of the court, before whom the cause is pending, by agreement of all the parties thereto, or their attorneys, may make out and deliver to the proper officers a list of jurors, sufficient to complete the panel, but such extra jurors shall be summoned only for the trial of that particular cause.

497.190. Names of jurors returned to wheel, when.—The name of every juror drawn for a special venire, and every juror excused by the court from attendance or service shall be returned to the wheel from which it was drawn, unless the judge shall order to the contrary; the jury commissioner shall erase from the list required to

be kept by him the name of any juror that shall be so ordered not returned to said wheel.

497.201. General provisions as to disqualification and exemption apply.—The provisions of sections 494.010, 494.020, 494.031 and 494.040, RSMo, relating to the qualifications and disqualifications of jurors and exemptions from service as a juror, shall be applicable to jurors drawn and selected under the provisions of this chapter.

497.210. Challenge for cause.—Any party may challenge any juror for cause for any reason mentioned in sections 494.010 and 494.020 and for any other causes authorized by the laws of this state.

497.230. Summons, how served.—Summons for jury duty may be served by the sheriff or by using the United States mail. Actual receipt of summons by mail by the person summoned for jury duty or by some member of his family over the age of fifteen years shall be lawful service.

497.240. Courts may direct number of jurors to be summoned and make rules for their service.—Each of said courts herein referred to may direct, from time to time, the number of jurors to be summoned for said court, and how long they shall be summoned before their attendance shall be required, and may make such rules and orders as it may deem proper, touching the jury service of the court, not inconsistent with the provisions hereof, and may enforce same by attachment and fine not exceeding one hundred dollars.

497.250. Consecutive time petit juror may serve.—No petit juror shall be permitted to serve on such jury for more than one consecutive week during any term of court; provided, that in no case shall this section cause

the discharge of any juror during the actual pendency of the trial of any cause.

497.260. Special grand jury list.—1. The circuit judges shall from time to time select the names of six hundred persons, known or believed by them to be in every way fitted for grand jury service, said selection to be repeated whenever deemed necessary by said judges of the circuit court, which names shall, by said judges, be erased from the petit jury lists in the said board of jury supervisors' office, or caused by them to be erased by said jury commissioner, but by them to be deposited in a special grand jury wheel, which, after being properly secured, shall be delivered to the care of the jury commissioner of the board of jury supervisors, who shall be responsible for the proper custody of the same, and which after the names are once placed therein, shall be opened and drawn only, by said jury commissioner, or one of his deputies, in the presence of two or more of said circuit judges, upon requisition of the judge of the criminal division of the circuit court for such number of grand jurors as may be required for any one term in said court.

2. The board of jury supervisors shall have the power, from time to time, whenever it shall appear to their satisfaction that a juror selected for grand jury service has died, moved from the jurisdiction of the court, or become otherwise disqualified to cause the name of each and every such person to be removed from the said special grand jury wheel. The judges of the circuit court in general term shall be empowered to fill any vacancy in the grand jury list, and cause the names of the persons so selected as grand jurors to be deposited in said special grand jury wheel.

497.270. Selection of grand jurors.—The number of names of grand jurors to be thus drawn from said special

grand jury wheel shall not be less than twenty-four nor more than thirty-six for each of the September and March terms of said criminal division of the circuit court. If any of the persons whose names are drawn are unable to serve for any reason, the judge of the court may require that additional names be drawn but the total number of names from which the grand jury is selected at any term of court shall not exceed thirty-six. From the names thus drawn in the September term, the judge of the criminal division of the circuit court shall select twelve grand jurors who shall serve continuously throughout the said September term and the succeeding November and January terms and until a new grand jury is summoned and sworn in during the following March term. From the names thus drawn in the March term, the judge of the criminal division of the circuit court shall select twelve grand jurors who shall serve continuously throughout the said March term and the succeeding May term and until a new grand jury is summoned and sworn in during the following September term. In addition to the twelve grand jurors selected at the September and March terms, the judge shall also select at each such term alternate grand jurors who shall serve only if ordered by the judge to do so because of the death, disability or inability to serve of one or more regularly selected grand jurors. The names of such persons that have been drawn, but not selected to serve by said judge, shall be returned to the special grand jury wheel by the jury commissioner of the board of jury supervisors in the presence of one or more of said circuit judges immediately after the terms for which they were drawn.

497.280. List of 600 names to be deposited with the clerk of the circuit court.—The list of six hundred names selected by the circuit judges duly certified to by the

clerk of the circuit court shall be deposited with the clerk of the circuit court for the trial of criminal causes, immediately after said names are selected by the said circuit judges in general term.

497.290. Person or officer failing to perform duties—misdemeanor.—Any person or officer who shall fail to perform any of the duties required by this chapter shall be deemed guilty of a misdemeanor.

REVISED STATUTES OF MISSOURI, 1975 SUPPLEMENT:

494.020. Persons ineligible for service.—1. The following persons shall be ineligible to serve as a juror, either grand or petit:

(1) Any person who has been convicted of a felony, unless such person has been restored to his civil rights, or of a misdemeanor involving moral turpitude;

(2) Any person who is unable to read, write, speak and understand the English language;

(3) Any person on active duty in the armed forces of the United States or any member of the organized militia on active duty under order of the governor;

(4) Any licensed attorney at law;

(5) Any judge of a court of record;

(6) Any person who, in the judgment of the court or other authority charged with the duty of selecting jurors, is incapable of performing the duties of a juror because of mental or physical illness or infirmity;

(7) Any person not drawn or selected according to the applicable provisions, respectively, of chapter 540,

RSMo, as amended, relating to the selection of grand jurors; chapter 494, RSMo, as amended, relating to the selection of jurors in counties of the third and fourth classes; chapter 495, RSMo, as amended, relating to the selection of jurors in counties of the second class; chapter 496, RSMo, as amended, relating to the selection of jurors in counties now or hereafter containing a population of seven hundred thousand inhabitants or more; chapter 497, RSMo, as amended, relating to the selection of jurors in judicial circuits comprised of a county now or hereafter having a population of not less than four hundred and fifty thousand nor more than seven hundred thousand inhabitants; chapter 498, RSMo, as amended, relating to the selection of jurors in cities of more than five hundred thousand inhabitants; chapter 499, RSMo, as amended, relating to the selection of jurors in magistrate courts.

2. Any person who has served as a member of a grand jury panel within ten years next preceding his selection shall not be eligible for service as a grand juror.

494.031. Persons entitled to be excused from jury service.—The following persons shall, upon their timely application to the court, be excused from service as a juror, either grand or petit:

(1) Any person over the age of sixty-five years;

(2) Any woman who requests exemption before being sworn as a juror;

(3) Any person licensed to engage in and actually engaged in the practice of medicine, osteopathy, chiropractic or dentistry;

(4) Any person actually performing the duties of a clergyman;

(5) Any professor or teacher in any school or institution of learning;

(6) Any person who has served upon a regular state or federal petit jury panel within one year next preceding his application and if the jury be a magistrate jury drawn and selected under the provisions of section 499.010, RSMo, no person who has served upon a magistrate jury within one year next preceding his application;

(7) Any officer or employee of the executive, legislative or judicial departments of the federal, state, county or city government who is actively engaged in the performance of his duties;

(8) Any person whose absence from his regular place of employment would, in the judgment of the court, tend materially and adversely to affect the public safety, health, welfare or interest;

(9) Any person upon whom service as a juror would in the judgment of the court impose an undue hardship.

APPENDIX B

No. 39102

IN THE MISSOURI COURT OF APPEALS
ST. LOUIS DISTRICT
Division Four

STATE OF MISSOURI,
Plaintiff-Respondent,

v.

ANDREW LEE HARRIS,
Defendant-Appellant.

Appeal From the Circuit Court of the City of St. Louis
Hon. Lackland Bloom, Judge

OPINION

(Filed June 20, 1978)

The defendant-appellant, Andrew Lee Harris, was found guilty by a jury of robbery in the first degree, §560.120, RSMo. 1969 and was sentenced by the court to fifteen years imprisonment pursuant to the Second Offender Act, §556.280, RSMo. 1969. Defendant appeals.

Because one of the points assigned as error alleges that the identification procedure used was fatally flawed, it will be necessary to describe the circumstances of the crime and the later identification confrontation in some detail. In so doing, all evidence and favorable inferences tending to support the verdict are taken as true. State v. Harris, 452 S.W.2d 577 (Mo. 1970); State v. Oldham, 546 S.W.2d 766 (Mo.App. 1977).

A jury reasonably could have found the following.

At approximately 9:45 p.m. on the night of the crime, the victim, Isaac Guyton, was alone in his apartment. He allowed four people to enter: Doris Johnson, who was a friend of his, the appellant and two others. While the appellant brandished a knife at him, the victim was told by one of the four to lie on the floor. Shortly after that, a pillow case was placed over the victim's head and he was bound by a pair of suspenders. The victim, however, had an opportunity to view the appellant from a distance of about three feet for nearly two minutes before being restrained. The intruders proceeded to ransack the apartment and then departed. After their exit, the victim untied himself and looked out the front door. He saw one of the intruders putting some clothing into the car which then pulled away. Thereafter, the victim called the police who quickly arrived at the scene. The victim described the robbers, the goods taken and, with the greatest detail, the getaway car. A short time following, police officers stopped this car about a half mile from the scene. The appellant was in the front seat and Doris Johnson in the rear. Numerous articles taken from the victim's residence were also in the car. One of the officers questioned the four passengers, all of whom were then arrested and taken to the station along with the goods.

Once at the police station, the four suspects and at least some of their spoils were placed in a room where the confrontation procedure later took place. There was testimony by the victim that the police summoned him with the words, "we got the man that robbed you." The police apparently made no attempt to find others in the station of similar appearance to the appellant or the other suspects. Consequently, the actual confrontation included only the four suspects. The confrontation procedure was conducted

at about 10:55 P.M., a little more than an hour after the robbery occurred. The victim appeared and positively identified the appellant.

In this appeal, appellant alleges three points of error. In his first he contends that the trial court erred in overruling the motion to suppress the identification testimony of the State's witness, Isaac Guyton because the pre-trial confrontation procedure was so unnecessarily suggestive and conducive to irreparable mistaken identification as to be violative of the defendant's due process rights.

When an in-court identification is attacked on the ground that pretrial identification procedures violated due process, the inquiry extends first to a determination of whether the procedures were unduly suggestive, and if they were, whether there is an independent source of identification. State v. Barnes, 537 SW2d 576 (Mo.App. 1976). Proof of a source of identification independent of the confrontation itself is enough to overcome a claim of unnecessary suggestiveness in the identification procedure. State v. Jones, 528 SW2d 14 (Mo.App. 1975).[1]

We turn first, therefore, to an examination of the procedure employed in this case. Appellant specifically points out three circumstances which he claims make the confrontation procedure suggestive: 1) Appellant was placed in a pretrial confrontation room with Doris Johnson whom the police already knew had been named by the victim as an accomplice. 2) Stolen property was on

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1. Also see State v. Barnes, 535 SW2d 602 (Mo.App. 1976); State v. Johnson, 539 SW2d 493 (Mo.App. 1976); State v. Dancy, 541 SW2d 35 (Mo.App. 1976); State v. McFadden, 530 SW2d 440 (Mo.App. 1975); State v. Rutledge, 524 SW2d 449 (Mo.App. 1975); State v. Johnson, 522 SW2d 106 (Mo.App. 1975); State v. Ealey, 519 SW2d 314 (Mo.App. 1975); State v. Green, 515 SW2d 197 (Mo.App. 1974); State v. Hudson, 508 SW2d 707 (Mo.App. 1974).

the table in front of the appellant. 3) The police summoned the victim saying that they had the robber.

We need not reach the question of whether these circumstances give rise to an unnecessarily suggestive confrontation procedure. It is enough to note that the procedures used by the police in this case were less than exemplary.

Even assuming, but not holding, that the procedures used were unnecessarily suggestive, if the facts of this case indicate that the identifying witness had a sufficient basis in fact for an independent basis of identification then the suggestiveness of the procedure is overcome and the testimony admissible. *Jones*, supra.

To aid in this determination of whether there exists an independent basis, the U.S. Supreme Court in Neil v. Biggers, 409 U.S. 188, (1972), reiterated that the factors to be considered include:

> ". . . the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Id. at 199.

In the adjudication of this rule, the Missouri Courts have adopted a threefold test, articulated somewhat differently, but of the same scope and intent as in *Neil*, supra. State v. Parker, 458 SW2d 241 (Mo. 1970) stated that consideration be given to 1) the presence of an independent basis of identification, 2) the absence of any suggestive influence by others, and 3) positive courtroom identification.

Tested both by the factors laid down in *Neil* and those articulated in *Parker*, we turn to the facts at hand.

The record shows that the witness viewed the defendant in a well-lighted room at a very close range for several minutes apparently with a high degree of attention. The time elapsed between the incident and the confrontation was slightly longer than one hour. The witness was absolutely certain in his identification of the defendant at the confrontation. Furthermore, the witness testified that his recognition of the defendant was based on his "looks and features" and not on the basis of the articles on the table before him. Finally, at trial, the witness positively identified the defendant as the man who had robbed him.[2] Under these circumstances it is clear that there exists a sufficient basis for the identification independent of the arguably suggestive confrontation procedure. As such, there is little if any likelihood of misidentification. The trial court, therefore, did not err in admitting the identification testimony.

Appellant alleges as his second point of error that the trial court erred in overruling certain hearsay objections made by appellant's counsel during the direct testimony of two police officers. In each case, the officer on the stand was being questioned as to the replies he received from the occupants of the car concerning certain articles in the car. The statements contested as hearsay were, "[n]obody knew nothing about any of the property

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2. In his brief, appellant emphasizes that the witness wavered somewhat in his in-court identification of the defendant. Examination of the record indicates that the in-court identification was not absolute. The victim noted that the defendant's appearance had changed and that he could not recognize him exactly. He did, however, correctly point out the defendant. It is not fatal that, by reason of defendant's change in appearance over a long lapse of time, the witness' in-court identification is less absolute than the one made more than two years earlier at the original confrontation procedure. It is sufficient here, especially in view of the other indicia of reliability, that the victim was able to point out the defendant in court as the man who took part in the robbery.

that was in the car, . . ." and "[e]verybody in the car denied ownership of the property."

Hearsay evidence is testimony in court of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter. Sabbath v. Marcella Cab Co., 536 SW2d 939 (Mo.App. 1976; Still v. Travelers Indemnity Co., 374 SW2d 95 (Mo. 1963); Bond v. Wabash R. Co., 363 SW2d 1 (Mo. 1962); Mash v. Missouri Pacific R. Co., 341 SW2d 822 (Mo. 1960); McCormick on Evidence, 2nd Ed. §246. Tested by this definition, it is clear that the phrases spoken by the officers while on the stand were evidence of statements made out of court. The crucial inquiry, then, is whether the statements by the occupants of the car to the effect that they neither owned nor knew about the stolen items were indeed offered to prove the fact that they neither owned nor knew about those items. We conclude that it is unlikely that the State would introduce evidence which would tend to exculpate by negativing knowledge. It is clear from the record that the statements were not offered to show inferentially, as appellant contends, that since the others in the car denied ownership of the items, the property was in the defendant's possession. The replies to which the officer on the stand testified do not indicate that it was only the "others" who denied ownership or disclaimed knowledge but, on the contrary, that "everybody" denied ownership and "nobody" knew anything concerning the ownership of the property. The statements, therefore, were not introduced for the purpose of proving the truth of the matters asserted therein. As such, they were not hearsay and any objection on that ground was properly overruled by the trial court.

Appellant's third point claiming that the Missouri jury selection provision which excuses women from service upon request is violative of the equal protection clause of the Fourteenth Amendment is likewise without merit. It is apparently appellant's contention that the requirement that a petit jury be selected from a representative cross-section of the community, which is fundamental to the jury trial guaranteed by the Sixth and Fourteenth Amendments, was violated in the selection of the jury that found him guilty.

The constitutionality of a statute is considered in light of the party seeking to raise the question and of the particular application of the statute to him. A constitutional attack may not be made by one whose rights are not, or are not about to be adversely affected by the operation of the statute. State v. Brown, 502 SW2d 295 (Mo. 1973) cert. denied 416 U.S. 973, 94 S.Ct. 1999, 40 L.Ed2d 562; See also Kansas City v. Douglas, 473 SW2d 101 transferred to 483 SW2d 760 (Mo. 1971); State v. Toliver, 544 SW2d 565 (Mo. banc 1976).

Appellant must allege, therefore, that he has been adversely affected by the application of the rule he challenges, i.e. that the Missouri jury selection process worked to compose a jury which, in this case, did not come from a representative cross-section by reason of the fact that women are excused upon request. The record in the instant case, however, shows the contrary to be true.

On the appellant's first jury panel of 18, 13 were women and on the second panel of 17, 12 were women. As a result, from a total of 35 potential jurors, 25 were women. It should also be noted that the jury finally sworn was comprised of 11 women and one man.

It is clear that defendant has failed to show that he was prejudiced by the operation of this statute. We hold, therefore, that he lacks standing to challenge its constitutionality.

Moreover, even if this selection process were found to be unconstitutional on the facts of another case, it is difficult to see how the defendant in the instant case was prejudiced by a jury selection panel which consisted of 25 women and 10 men.

The judgment is affirmed.

/s/ Robert G. Dowd
Robert G. Dowd, Presiding Judge

Robert O. Snyder (Judge) Concurs

Alden A. Stockard (Special Judge) Concurs